



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 536 OF 2017

(Formerly Machakos HCCC No. 49 of 2011)

GALLERY GOD MISSION TRUST.....PLAINTIFF

VERSUS

ALFRED TOBIKO YIANKASO alias ALRED TOBIKO MURUMBI

TOBIKO YIANKASO MURUMBI

JOSEPH YIANKASO MURUMBI

FLORA TOBIKO.....DEFENDANTS

RULING

What is before Court for determination is the Plaintiff's application dated the 13th February, 2015 and the Defendants' 27th February, 2015. In the application dated the 13th February, 2015 the Plaintiff has brought it pursuant to Order 40 rule 1(a) (b), 2 and 3 Rule 8, Order 51 rule 1, 7 and 9 of the Civil Procedure Rules, Section 37 of the Trustee Act and Sections 1A, 1B and 3A of the Civil Procedure Act and all the other enabling provisions of the law. The Plaintiff seeks injunctive orders, setting aside a Decree issued by Hon. P. D Gesora; reinstatement of the instant suit and a declaration that the addendum of the Defendants as trustees in the trust deed while the suit was before court was illegal.

The application dated the 13th February, 2015 is premised on the following grounds:

1. The Defendant masquerading as the Plaintiff herein and to defeat the ends of justice, discontinued the suit using documents obtained by fraud and misled the Deputy Registrar to issue a decree without the knowledge of the legitimate trustees who had filed the suit against the respondents herein.
2. That on 25th March, 2013 the Deputy Registrar Hon. P Gesora in the absence of the Plaintiff/Applicant wholly terminated the Plaintiff's suit instituted by the legitimate trustees.
3. That on 10th February, 2015, the Respondents withdrew a preliminary objection on which a consent order preserving the suit property was pegged leaving the property at risk.
4. That the Defendants are making frantic efforts to sell the suit property and are destroying the developments therein using the decree granted on 25th March, 2013.
5. That the surviving trustee has reported the actions of the Defendants to the criminal investigation department in Nairobi vide O.B No. 40/3/2/12/14 and he is keen to ensure that their right in this matter is adequately protected.
6. That the Defendants during the subsistence of the suit and more particularly in their Defense never pleaded ownership of the property and were never trustees to the suit property.
7. That the termination of the suit by the Defendants was discreetly done during the lifespan of an injunction issued by Honourable Justice G. Dulu.
8. That the actions of the Defendants is an illegality and unprocedural and the same should not be allowed to stand.

This application is supported by the affidavit of JANE NYABIAGE ODIYO who is acting for the Plaintiff where she avers that Justice Dulu issued orders of injunction dated the 14th December, 2012 and when she sought for the extension of the said orders on 12th November, 2013 as well as 14th November, 2013 respectively, she found that the Plaintiff's suit had been discontinued by the Defendants' respondents herein vide a Notice of Discontinuance of the suit filed on 5th March, 2013 signed by the 1st, 2nd and 3rd Defendants purporting to be the Plaintiff. She contends that based on the misrepresentation, a decree was issued allegedly by Hon. P. N. Gesora Deputy Registrar on 25th March, 2013. She claims she has been informed by one of the trustees Magnar Wagner Kelsen that at no point were the suing trustees ever consulted in relation to the change in the trustees and more particularly as there was an injunction in place preserving the suit property. Further, that the surviving trustee on 3rd December, 2014 filed a report at the CID vide OB No. 40/3/12/14 to report the impersonation as the Trustees of the Plaintiff by the Defendants. She insists the Plaintiff is a trust and the suit had been instituted by two trustees which had all along and continues to be represented by an advocate; that at no point had the Plaintiff acted in person. She reiterates that it is illegal and unprocedural that persons expressly named as Defendants can turn around in the same suit and become Plaintiffs as implied in the filed Notice dated 14th February, 2013 to act in person which Notice was not served upon the Plaintiff's advocates. She avers that this misrepresentation to Hon. P. Gesora acting in his capacity as a Deputy Registrar was misleading and the said Decree ought to be set aside or vacated. Further, the application and subsequent decree issued by Hon. Deputy Registrar was drawn and filed as well issued without the knowledge including presence of the Counsel for the Plaintiff herein. Further, that the Certificate of Incorporation attached to the Notice of Discontinuance does not name any persons who signed the said Notice of Discontinuance as trustees namely TOBIKO YIANKASO MURUMBI, JOSEPH YIANKASO MURUMBI and FLORA TOBIKO. She states that the original Trust Deed establishing the Plaintiff dated the 25th April, 2001 does not have TOBIKO YIANKASO MURUMBI, JOSEPH YIANKASO MURUMBI and FLORA TOBIKO as trustees to the Plaintiff.

The Defendants' application dated the 27th February, 2015 is brought pursuant to Order 26 rule 1, 4 and 6 of the Civil Procedure Rules and any other enabling provisions of the law. It seeks the following orders:

1. Spent.
2. That the Plaintiff's/ Applicant's Advocate JANE ODIYA NYABIAGE be ordered to provide security for costs that shall/may arise out of the continued proceedings in this cause which proceedings are at the instance of or reason of the Plaintiff's actions and in particular the alleged trustee MAGNAR W. KARLSEN and JANE ODIYA ADVOCATE.
3. That the costs be estimated at Kshs. 1,000,000 and that the same be deposited in a joint interest earning account in the joint names of the Advocates for the parties herein.
4. That security for costs as will be required or as is commensurate be provided within a specified period and before any further proceedings are undertaken by the Plaintiff herein failing which the Plaintiff's application now pending do stand dismissed with costs to the Defendants.
5. That the costs of this application be provided for.

This application is premised on the grounds which in summary is that the suit as filed, even if reinstated, stands no chance of being successfully maintained and prosecuted. The advocates on record for the Plaintiff have admitted on oath that they do not have further instructions. The people giving instructions to the Advocates on record for the Plaintiff are foreigners and the Plaintiff stands to incur costs that will not be paid. It is supported by the affidavit of ALFRED TOBIKO the 1st Defendant herein who claims to be the registered and managing trustee of the Plaintiff since 4th March, 2009. He contends that Mr. Magnar Wagner Karlsen is not a trustee and his removal was duly done in terms of the Plaintiff's constitution when Karl Thurang Lebro was present. Further, that Mr. Magnar Wagner Karlsen cannot legally institute or sustain any suit in the name of the trust and that he is Norwegian who always resided in Norway and has no business nor assets in Kenya. He insists the Defendants will certainly not be paid costs in the event the application and suit collapses.

The application is opposed by the Plaintiff who filed a replying affidavit sworn by JANE NYABIAGE ODIYA the advocate herein where she reiterated that the Defendants are not trustees to the Plaintiff.

The Plaintiff filed a Supplementary Affidavit sworn by MAGNAR WAGNER KARLSEN who insisted he is one of the trustees and stated that the application dated the 27th February, 2015 is meant to scuttle the hearing and determination of the Plaintiff's application dated the 17th February, 2015 and the irregularly terminated suit filed on 21st February, 2011. He contends that the Defendants have never been registered as trustees of the Plaintiff and any position alleged was obtained by fraud which matter is under investigation. He refutes that the 1st Defendant is the managing trustee of the Plaintiff as he has not produced any evidence to prove it. He confirms he lodged a complaint for his removal as trustee with the CID in December, 2014 and insists he is still a trustee of the Plaintiff, with full capacity to institute a suit in the name of the trust herein. Further, that Advocate Jane Nyabiage Odiya's application to cease acting has not been heard and insists the Defendant's application is pre-emptive, baseless and inappropriate. He confirms that advocate Jane Nyabiage Odiya has always worked under their authority and orders sought by the Defendants are not merited. Further, that the firm of Moses N. Siagi & Company Advocates are not properly on record hence have no right of audience.

Both parties filed submissions that I have considered.

Analysis and Determination

Upon perusal of materials presented in respect of the Plaintiff's application dated the 13th February, 2015 and the Defendants' dated the 27th February, 2015, the following are the issues for determination:

- Whether or not the Notice to Act in person was properly filed in court.

- Whether or not the Notice of Discontinuance of the suit dated the 5th March, 2013 was filed by the Plaintiff and therefore valid.
- Whether JANE ODIYA NYABIAGE Advocate should provide security for costs for Kshs. 1,000,000.

The main contention which cuts across the two applications is whether the Defendants are now the Trustees of the Plaintiff and properly filed a Notice to Act in Person as well as the Notice of Discontinuance of the Suit. The Defendants contend that they replaced the previous Trustees and are now properly the Trustees for the Plaintiff. MAGNAR WAGNAR KELLEN, a former Trustee insists he is still a trustee and his removal was fraudulent culminating in an investigation. He however has not informed Court of the outcome of the investigation.

I note two of the original trustees died but one MAGNAR WAGNAR KELLEN is still alive and insists he is still a Trustee to the Plaintiff. I note messrs JANE ODIYA ADVOCATE were and are acting under instructions from MAGNAR WAGNAR KELLEN who is still alive and was one of the original Trustees to the Plaintiff.

The Defendants signed a Notice to Act in person in place of the Plaintiff's Advocate and thereafter filed a Notice of Discontinuance of the Suit against themselves.

Order 9, rule 8 of the Civil Procedure Rules provides that:

(1) Where a party, after having sued or defended by an advocate, intends to act in person in the cause or matter, he shall give a notice stating his intention to act in person and giving an address for service within the jurisdiction of the court in which the cause or matter is proceeding, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of intention to act in person, with the necessary modifications.

I note the Plaintiff's purported Notice to Act in person dated the 14th February, 2013 did not indicate that they were serving the same upon the Plaintiff's advocate on record as required by Order 9 rule 8 of the Civil Procedure Rules.

This in essence means that once the party has filed a Notice to Act in Person, he/she should serve the Advocate with the same, which I find was not the position in the current scenario.

The Defendants purportedly representing the Plaintiff's interest as their Trustee proceeded to thereafter file a Notice of Discontinuance of the Suit Against themselves.

Order 25, rule 2 the Civil Procedure Rules provide that:

'(1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.

(2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.'

On perusal of the Notice to Discontinue the suit dated the 5th March, 2013 there is no indication on who the same was served upon and whether leave to withdraw the same was sought.

From these facts, I note an element of mischief because the Defendants became representatives of the Plaintiff, filed the Notice to Act in Person which the Plaintiff's lawyer claims to have not been served with and thereafter filed the Notice of Discontinuance of the suit against themselves before the Deputy Registrar and not before the Judge. The Defendants who were now representing the Plaintiff's did not indicate whether they sought leave of the Judge in accordance to Order 25 rule 2 before discontinuing the suit.

On perusal of the Plaint, I note the suit land and the claim concerns an institution which is for the public benefit. Further ,I note the original trustee who is still alive has insisted his removal was fraudulent and even reported the matter to the Police which matter is being investigated. I note the suit contains allegations of fraud against the Defendants personally.. I note that the Plaintiff sued the Defendants in their own personal capacity and that the Plaintiff is an legal entity capable of suing and being sued.

In so far as the Defendants purport to be trustees to the Plaintiff, this fact alone cannot defeat an suit against them in their own personal capacity. The issue of who is the proper Trustee of the Plaintiff can only be determined by the Court after all the evidence is presented. I note the Defendants had been trying to strike out the suit against themselves and I believe they got a window to discontinue the suit procedurally when the majority of the Plaintiff's trustees died leaving behind MAGNAR WAGNAR KELLEN who became the proverbial last man standing as against the Defendants who did not want a case against themselves. In the case of **Beijing Industrial Designing & Researching Institute v Lagoon Development Limited [2015] eKLR, the Court of Appeal in Malindi held as follows: ' In such eventuality, the plaintiff must obtain leave of the court to discontinue the suit or to withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the plaintiff's right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the court. That such leave is granted on terms suggests that it is not a mere formality.**

..... It follows therefore that a literal application of Order 25 Rule 1 in the circumstances of this suit would enable a party who is alleged to have undermined the rule of law to walk away scot-free by simply withdrawing the suit in which the law compels the respondent to file the application for contempt of court. As has consistently been stated by the courts, the law will not countenance a person benefiting from his wrongdoing or alleged wrongdoing. *Lord Finlay* expressed the principle as follows in NEW ZEALAND SHIPPING V. SOCIETE DES ATELIERS ET CHANTIERS DE FRANCE (1919) AC 1, which we agree

with:

“The decisions on the point are really illustrations of the very old principle laid down by Lord Coke (Co Litt. 206b) that a man shall not be allowed to take advantage of a condition which he himself brought about.”

Our conclusion that it was inappropriate to allow the respondent, at its sole discretion, to withdraw its suit in the circumstances of this case, finds favour and support from the decision of the House of Lords in CASTANHO V. BROWN & ROOT (UK) LTD & ANOTHER (1981) 1 ALL ER 143. In that case the plaintiff commenced proceedings in the UK for damages for personal injuries and obtained an order for interim payment of damages. While the proceedings in the UK were still pending, and in the hope of obtaining a higher award of damages, the plaintiff commenced another action in the USA. The defendant applied for stay of the USA suit upon which the plaintiff served a notice of discontinuance of the suit in the UK. Order 21 Rule 2(1) of the Rules of the Supreme Court allowed the plaintiff to discontinue the same without leave. The High Court struck out the notice of discontinuance on the ground that it was an abuse of the process of court. On appeal, the Court of Appeal reversed the decision and restored the notice of discontinuance.’

As held in the above mentioned Court of Appeal decision, a person should not be allowed to take advantage of a situation so as to defeat a suit. Land matters are very emotive and from the facts as presented it is pertinent for the Court to delve deeper as to why the Defendants were discontinuing a suit against themselves. I further note that the Notice of Discontinuance of suit was filed before the Deputy Registrar but the same was not adopted by the Judge as an order of the Court. All these proceedings by the Defendants smerk of the dishonesty and ought to be investigated.

In relying on the above Judicial Authority and the circumstances at hand, I note no leave was sought before the Notice of Discontinuance of Suit was adopted by the Deputy Registrar. Since this is so, I find that it would be pertinent if this Notice was set aside and the suit heard on its merits.

The Defendants insist that before the order is set aside ,the Plaintiff’s counsel should give security for costs. I note the Plaintiff’s counsel as per the affidavit of MAGNAR WAGNAR KELLEN is under instructions from MAGNAR WAGNAR KELLEN and not from herself. An order for security for costs cannot be granted against an advocate for a party but the party himself. I further find at that at this stage the security for the Defendant’s costs cannot be ascertained. I will decline to grant the said order.

It is against the foregoing that I find the Plaintiff’s application dated the merited. I exercise my discretion and proceed to set aside the judgment and decree and direct that the suit herein be and is hereby reinstated. I further direct that the parties do comply with Order 11 and the suit be set down for hearing on its merits.

The obtaining status quo thereafter be maintained pending the hearing and determination of the suit.

Dated signed and delivered in open court at Kajiado this 28th day of June, 2018.

CHRISTINE OCHIENG

JUDGE